SUPREME COURT OF THE UNITED STATES.

No. 525.

EDWIN A. MERRITT, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ALPHONSE STEPHANI AND WILLIAM G. MOEHRING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Alphonse Stephani and William G. Moehring, plaintiffs, and Edwin A. Merritt, defendant, a manifest error hath happened to the great damage of the said Edwin A. Merritt, as by his complaint appear: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-one, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of June, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

The foregoing writ is hereby allowed.
June 7th, 1881.

SAM'L BLATCHFORD,
Circuit Judge.

2 (Indorsed:) E. & A. A., 633. 6075. U. S. Supreme Court. Edwin A. Merritt, plaintiff in error, against Alphonse Stephani and William G. Moehring, defendants in error. Writ of error. S. L. Woodford, attorney for plaintiff in error.

Due service of a copy of the within writ of error is hereby admitted.
New York, June 7th, 1881.

HARTLEY & COLEMAN,
Attorneys for Defendants in Error.

U. S. circuit court. Filed June 7, 1881. Joseph M. Deuel, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Joseph M. Deuel, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify
3 that the following pages, numbered from four to twenty-eight inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Edwin A. Merritt, plaintiff in error

against Alphonse Stephani and William G. Moehring, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the southern district of New York, in the second circuit, this thirteenth day of June, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the said United States the one hundred and fifth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

4 The President of the United States of America to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Edwin A. Merritt, defendant, by A. Stephan & iano., plaintiffs, do therefore command you that the record and proceedings in the said cause you, distinctly and openly, send to the said circuit court, at the city of New York, on the 19th day of December, 1879, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 16th day of December, in the year one thousand eight hundred and seventy-nine.

[L. S.] JOHN I. DAVENPORT, *Clerk.*

STEWART L. WOODFORD,
U. S. Attorney, Attorney for Defendant.

5 (Indorsed:) U. S. circuit court. *vs.* Edwin A. Merritt Copy certiorari. Stewart L. Woodford, U. S. attorney, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, 188 .

Yours,

STEWART L. WOODFORD,

To , plaintiff's attorney.
U. S. Attorney, Attorney for Defendant.

Due service of a copy of the within, and of the above notice, is hereby admitted.

New York, 188 .

Plaintiff's Attorney.

6 *Complaint.*

Circuit court of the United States for the southern district of New York.

ALPHONSE STEPHANI AND WILLIAM G. MOEHRING, plaintiffs,
against
EDWIN A. MERRITT, defendant.

Plaintiff complains—

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were, during said times, partners in trade, under the firm-name of A. Stephani & Company, and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. That by the laws of the United States the said goods were
7 free of duty, and plaintiffs, in order to obtain said goods, were compelled to pay the defendant, as such collector, the sum of one hundred & three $\frac{50}{100}$ dollars in excess of the said rate and of the amount required by law

4th. That plaintiff filed with said defendant due and timely protest in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiffs made due and timely appeals on each entry to the Secretary of the Treasury, who affirmed the decision of the defendant upon certain of said entries, and as to the rest neglected for more than ninety days, as well from the dates of said appeals as prior to the commencement of this action, to decide said appeals.

6th That the bill of particulars, hereto annexed, states for each
8 importation separately, the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protest, of the appeal to the Secretary of the Treasury, and of his decision thereon, if rendered; together with the other particulars required by law; and is made a part hereof.

7th. That said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for one hundred & three $\frac{50}{100}$ dollars, with interest on the several sums named in the bill of particulars, from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

HARTLEY & COLEMAN,
Attorneys for Plaintiffs.

9 *Bill of particulars.*

[Name of importer (for all the importations). A. Stephani & Company.]

Description of goods.	Name of vessel.	Whence imported.	Date of invoice.	Date of entry at custom-house.	Date of payment of duties in excess.	Amount of duty illegally exacted.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
			1879.				1879.		
Bottles containing natural mineral waters.	Rhynland.	Antwerp.	June 4	June 23	June 24	103 50	July 3	July 3	Sep. 13

10 (Indorsed:) U. S. circuit court, southern district of New York. against Edwin A. Merritt. Bill of particulars.

NEW YORK, , 1881.

To , defendant's attorney:

SIR: Please to take notice that this action is brought to recover duties illegally exacted by the defendant as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars.

HARTLEY & COLEMAN,
Plaintiff's Attorneys, 62 Wall street.

Due service hereof admitted this day of , 1880.

Defendant's Attorney.

11 United States circuit court, southern district of New York.

ALPHONSE STEPHANI & ANO.,
versus
EDWIN A. MERRITT, COLLECTOR, ETC.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiffs in the above-entitled action.

I. He admits he was, at the times in said complaint mentioned, collector of the port of New York, and in such official capacity received payment from the plaintiffs for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiffs into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiffs at the times in said complaint mentioned, were paid by said plaintiffs as a debt due by them to the United States, and not otherwise; and were received by defendant, by virtue of his office as said collector and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forthwith, thereafter, and before the commencement of this action, or the service of any protest, paid into the Treasury of the United States; and that the amount of said moneys so received

from plaintiffs were the amounts due from them to the United States, according to the rate of duty imposed by law upon the several articles of merchandise by them imported and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's import entry thereof were collected or received by defendant from the plaintiffs.

III. And defendant, further answering, denies that he has at this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint, by the marks and numbers and description there given, except in so far as to state, and defendant herein answering doth aver and state, that said merchandise was not dutiable according to the laws of the United States at the rates specified in the complaint.

IV. And defendant, further answering, admits that plaintiffs filed with defendant certain protests, but he denies that he has sufficient information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiffs, conformable to the laws of the United States, and defendant leaves plaintiffs to make such proof thereof as they may be advised.

V. And as to any other allegations in said complaint contained, not hereinbefore fully answered or admitted, defendant denies the same, and each thereof, and leaves the plaintiff to make such proof thereof, as they may be advised.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

12 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Edwin A. Merritt, being duly sworn, says that he is the defendant above named, that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me this day of , 18 .

Notary Public, New York County.

(Indorsed:) U. S. circuit court, southern district of New York. vs. Edwin A. Merritt, collector, etc. Answer. Stewart L. Woodford, United States attorney, attorney for defendant.

Due service of a copy of the within answer is hereby admitted.

New York, , 188 .

Plaintiff's Attorney.

To , Plaintiff's Attorney.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the seventh day of April, in the year of our Lord one thousand eight hundred and eighty-one.

Present, the honorable Wm. J. Wallace, judge.

ALPHONSE STEPHANI ET AL.
vs.
EDWIN A. MERRITT. } 6075.

On motion of Edward Hartley, esqr., of counsel for the plaintiffs in the above-entitled action, ordered trial.

Jurors sworn: Geo. J. Degarmo, J. Munro Taylor, John Austin Stevens, Leonard J. Busby, Geo. S. Fitch, Bradford Rhodes, Henry Coggill, Forbes F. Allison, Geo. T. Dickerson, James S. Barron, Joseph T. Low, John A. Lowery.

Mr. Hartley opens the case on the part of the plaintiffs.

Evidence for the plaintiffs:

Pl'ff's invoice, entry, and protest.

Isaac Phillips sworn.

A. B. Herrick, ass't U. S. attorney, of counsel for the defendant, moves that the court direct the jury to find a verdict for the defendant.

14 The court denies said motion, and Mr. Herrick excepts to the ruling of the court in so doing.

Mr. Hartley moves that the court direct the jury to find a verdict for the plaintiffs for the sum of $115.50.

The court directs the jury to find a verdict for the plaintiffs for the sum of $115.50.

The jury say that, by direction of the court, they find a verdict for the plaintiffs for the sum of one hundred and fifteen dollars and fifty cents; and so say they all.

On motion of Mr. Herrick, ordered that the defendant have a stay of proceedings for thirty days within which to prepare and serve a bill of exceptions.

On like motion it is further ordered that a certificate of probable cause be entered herein.

15 U. S. circuit court, southern district of New York.

ALPHONSE STEPHONI ET AL.
vs.
EDWIN A. MERRITT. } 6075.

Judgment—June 3d, 1881.

The issues in this action having been brought on for trial before the honorable William J. Wallace, judge, and a jury, at a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the first Monday of April, 1881, and the issues having been tried and a verdict for the plaintiff having been duly rendered by said jury, on the 7th day of April, 1881, for the sum of one hundred and fifteen dollars and fifty cents, and their costs having been adjusted at

16 forty-eight dollars and thirty-five cents, now, on motion of Hartley & Coleman, attorneys for said plaintiffs, it is adjudged that the said plaintiff recover of the said defendant the sum of one hundred and fifteen dollars and fifty cents, the amount so found by the jury, with one dollar and eight cents, being interest from April 7th, 1881, together with

forty-eight dollars and thirty-five cents, their costs and disbursements, amounting in the whole to the sum of one hundred and fifty-four dollars and ninety-three cents.

Judgment signed this 3 day of June, 1881.

JOHN A. SHIELDS,
Deputy Clerk.

(Endorsed:) No. 6075. U. S. circuit court, southern district of New York. Alphonse Stephoni et al. vs. Edwin A. Merritt. Judgment record. Hartley & Coleman, pl'ffs' att'ys, 62 Wall st., N. Y. City. U. S. circuit court. Filed June 3, 1881. Joseph M. Deuel, clerk.

17 *Defendant's proposed bill of exceptions.*

United States circuit court, southern district of New York.

ALPHONSE STEPHONI & ANO. vs. EDWIN A. MERRITT. } No. 6075.

Be it remembered that on the trial of this action, before the honorable William J. Wallace, judge, and a jury, on the 8th day of April, 1881, the following among other facts were proved on behalf of the plaintiffs, viz:

That on the 23d of June, 1879, they imported at New York per the "Rhynland," from Antwerp, an invoice of natural mineral water in bottles, which they claimed the right to enter free of duty under the provision in the free list of the tariff, § 2505, Revised Statutes, viz: "The importation of the following articles shall be exempt from duty: Mineral waters, all not artificial."

18 The defendant, as collector of customs at New York, charged upon the bottles containing the water a duty of 30 % ad valorem, under the following provision in schedule B of the tariff, viz: "Glass bottles or jars filled with articles not otherwise provided for, thirty per cent. ad valorem."

Upon the water itself he charged no duty.

Plaintiffs paid the aforesaid duty under due and timely protest, in writing, and due and timely appeal was taken to the Secretary of the Treasury, who sustained the collector's action, and thereafter the plaintiffs in due season brought this suit.

It was further proved on behalf of the plaintiffs that mineral waters are and have always been generally imported into this country in glass bottles, although sometimes contained in stone bottles or jugs, but the glass bottle is the usual form and kind of package for natural mineral waters.

The foregoing facts were uncontradicted by the defendant, who offered no testimony, but at the close of plaintiffs' case moved the court, by his counsel,

19 to direct a verdict in his behalf, which motion the court then and there denied, and to which ruling of the court the defendant's counsel then and there excepted, which exception was then and there noted and allowed by the court.

And thereupon the plaintiffs' counsel moved the court to direct a verdict for the plaintiffs, which motion the court then and there granted, and

directed the jury to find a verdict for the plaintiffs for the amount of the plaintiffs' claim, to which ruling and direction of the court the defendant's counsel then and there excepted, which exception was then and there noted and allowed by the court.

And because the facts aforesaid do not otherwise appear by the record, the defendant's counsel have tendered this their bill of exceptions, which the court has allowed and signed and directed to be filed this 30th day of May, 1881, as and for the 8th day of April, 1881, nunc pro tunc.

WM. J. WALLACE, *Judge.*

(Endorsed:) 6075. U. S. circuit court, southern district of New
20 York. Alphonse Stephoni & ano. vs. Edwin A. Merritt. Defendant's proposed bill of exceptions. Stewart L. Woodford, United States attorney, attorney for defendant.

Due service of a copy of the within is hereby admitted.
New York, May 24th, 1881.

HARTLEY & COLEMAN,
Pl'ffs' Attorneys.

U. S. circuit court. Filed May 31, 1881. Joseph M. Deuel, clerk.

To Messrs. HARTLEY & COLEMAN, *Att'ys for Pl'ffs:*

GENTLEMEN: Please take notice that the within is a copy of the proposed bill of exceptions on behalf of the defendant in the case of Alphona Stephoni & ano. vs. E. A. Merritt, N. S. 6075, which will be presented for settlement before Hon. William J. Wallace, the judge who pre-
21 sided at the trial of said case.

New York, May 24, 1881.
Yours, &c.,

S. L. WOODFORD,
U. S. Attorney, Att'y for Def't.

To Messrs. Hartley & Coleman, Attorneys for Plaintiffs.

22 Supreme Court of the United States.

EDWIN A. MERRITT, PLAINTIFF IN ERROR,
vs.
ALPHONSE STEPHANI & WILLIAM G. MOEHRING, defendants in error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol in Washington, comes the said plaintiff in error, by Stewart L. Woodford, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error, whereas by the law of the land the said judgment ought
23 to have been given for the said plaintiff against the said defendants, and the said plaintiff prays that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, anulled, and altogether held for nothing, and that

he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

STEWART L. WOODFORD,
Attorney for Plaintiff in Error.

(Endorsed:) U. S. Supreme Court. Edward A. Merritt, plaintiff in error, versus Alphonse Stephani & ano., defendants in error. Assignment of error. Stewart L. Woodford, United States attorney, attorney for plaintiff in error.

Due service of a copy of the within is hereby admitted.
New York, June 9th, 1881.

HARTLEY & COLEMAN,
Att'ys for Def'ts in Error.

24 To Messrs. Hartley & Coleman, att'ys for de'fts in error. U. S. circuit court. Filed June 9th, 1881. Joseph M. Deuel, clerk.

25 Supreme Court of the United States.

EDWIN A. MERRITT, PLAINTIFF IN ERROR,
vs.
ALPHONSE STEPHANI & AL. DFFENDANTS IN error.

Afterwards, to wit, on the second Monday of October, A. D. 1881, the said defendants in error by Hartley & Coleman, their attorney', freely come here into court and say that there is no error, either in the record or proceedings aforesaid, or in giving the judgment aforesaid, wherefore they pray that the court now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesid given, may be in all things affirmed, &c.

HARTLEY & COLEMAN,
Attorneys for Defendants in Error.

26 (Endorsed:) U. S. Supreme Court. Edwin A. Merritt, plaintiff in error, versus Alphonse Stephani, def't in error. Joinder in error.

Due service of a copy of the within is hereby acknowledged this 9th day of June, 1881.

S. L. WOODFORD,
U. S. Att'y for Pl'ff in Error.

Hartley & Coleman, def'ts' att'y, 62 Wall st., New York City, U. S. circuit court. Filed June 9, 1881. Joseph M. Deuel, clerk.

27 UNITED STATES OF AMERICA, *ss:*

To Alphonse Stephani and William G. Moehring, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second

Monday of October, eighteen hundred and eighty-one, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Edwin A. Merritt is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated June 7th, 1881.

SAM'L BLATCHFORD,
Circuit Judge.

28 (Indorsed:) E. & A. A. 633. 6075. U. S. Supreme Court. Edwin A. Merritt, plaintiff in error, against Alphonse Stephani and William G. Moehring, defendants in error. Citation. S. L. Woodford, attorney for plaintiff in error.

Due service of a copy of the within citation is hereby admitted.
New York, June 7, 1881.

HARTLEY & COLEMAN,
Attorneys for Defendants in Error.

U. S. circuit court. Filed Jun. 7th, 1881. Joseph M. Deuel, clerk.

(Indorsement on cover:) No. 525. Edwin A. Merritt, collector of the port of New York, plaintiff in error, vs. Alphonse Stephani and William G. Moehring. S. New York, c. c. U. S. Filed 15 June, 1881.

OFFICE SUPREME COURT U. S.
FILED
MAR 1 1883
JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

MERRITT, COLLECTOR, &c., *vs.* STEPHANI, &c. } No. 525.

AND

SAME *vs.* PARK, &c. } No. 711.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

MERRITT, COLLECTOR, &c.,
vs.
STEPHANI, &c.
} No. 525.

and

SAME
vs.
PARK, &c.
} No. 711.

BRIEF FOR THE UNITED STATES.

These were suits to recover back money exacted from importers as duties upon glass bottles, covering (1) "natural mineral water" and (2) "beer."

In both cases the collector had exacted duty upon the *bottles*, as a separate article, in accordance with the provision in section 2504, Schedule B (Revised Statutes, p. 462), "Glass bottles or jars filled with articles not otherwise provided for, *thirty per cent. ad valorem*," whilst the

importers claimed that in *Stephani's* case the bottles were, like their contents (Revised Statutes, p. 486), *free*, and in *Park's* case were covered by the duty otherwise exacted upon their *contents, i. e.*, "35 cents per gallon," imposed by Schedule D, of section 2504 (Revised Statutes, p. 464), upon "beer in bottles."

The court below assented to and enforced the view of the importers.

I.—Stephani's Case.

The bill of exceptions is upon pp. 7 and 8 of the record; and it is submitted that the court below erred in directing (folio 19) a verdict for the plaintiff.

It is submitted that the provision (Revised Statutes, section 2505, p. 486) that "Mineral waters, all, not artificial" shall be *free*, implies nothing at all as to the freedom of any *package* in which they may be imported; whether this be one in which they are "generally imported" —ex. gr. *glass bottles*; or one in which they are "sometimes" imported—as stone bottles and jugs (folio 18).

In other words, if there be in another part of the act a provision which from general words or otherwise in an absence of the above provision for such waters would be

held to impose a duty upon the package the addition of such a provision would form a context of no weight whatever to control that conclusion.

It is true that the question whether an article is free is not necessarily decided by its being omitted from the tariff act. Still there are articles which are free although not expressly made so. There is, as I submit, no distinction to be drawn between articles thus free, *i. e.*, in the nature of things, and those that are free because expressly made so. The latter have no *supererogatory merit* to extend to other articles, such for instance as are necessary to their own importation. There is no implied *bounty* upon the importation of articles expressly made free, to the effect that the vehicle in which they are commonly brought shall also be free. Their importation is by the words of the statute a matter of mere *allowance*, and not in any wise one entitled to *protection*.

Natural mineral waters are no more *free* than ordinary drinking water is, yet this latter would hardly be thought to render *free* the glass bottles in which it might be imported.

There is no general proposition to the effect that free raw material (*ex. gr.* natural mineral waters) shall impart freedom to any manufactured article (*ex. gr.* bottles) requisite for its importation. On the contrary, such a suggestion contradicts a policy manifest throughout the whole tariff act. The connected *manufactured* article must stand upon its own tariff-merits.

II.—Park's Case.

It is submitted in this case, also, that the court erred in directing a verdict for the plaintiffs. (Folio 17.)

The article imported was 1,024 or perhaps 2,048, *see below*, gallons of beer in glass bottles.

The collector exacted (1) 35 cents per gallon upon the *beer*, under the provision (Revised Statutes, section 2504 Schedule D, p. 464), "*Ale porter and beer in bottles: 35 cents per gallon; otherwise than in bottles: 20 cents per gallon;*" and also (2) 30 per centum ad valorem upon the *bottles*, under the provision (Revised Statutes, section 2504, Schedule B, p. 462), "*Glass bottles or jars filled with articles not otherwise provided for: 30 per centum ad valorem.*"

The importers protested (folio 24) that only the former of these duties could be exacted, suggesting that the latter duty is by the statute included in the former.

I submit that where two imported articles which belong to the same general class of manufactures are regarded by the legislature, when taken individually, as falling under different policies, and therefore liable to different rates of duty, that difference will be *presumed* to attend them under all changes of circumstances that shall be common to them, and therefore may then be resorted to and reasoned from in order to clear up any obscurity which may otherwise have arisen.

To illustrate:

Ordinary bottles *of stone* are dutiable at 25 per centum ad valorem (Sched. B, first paragraph, p. 461.)

Such bottles *of glass* are dutiable, as above, at 30 per centum.

Ale in bottles whether of stone or glass however is dutiable without discrimination as to the package, but still at a greater rate than when not in bottles.

If it were not for the increase of duty when passing from the article *ale not in bottles* to that of *ale in bottles* there would be no reason for supposing that in the latter case the duty upon the bottles themselves was included in that upon the ale.

That increase, however, may excite a doubt. But a solution of such doubt by suggesting that the duty upon the bottles *is included* in that upon the bottled ale, is attended by the difficulty that the increase of duty is the *same* for *stone* bottles that it is for *glass*, whereas it is clear from the context that tariff legislation regards these articles differently.

Thereupon, as it seems, the question immediately occurs whether there be not in the change between *ale* and *ale in bottles* some act of the nature of *manufacture*, which also is *the same* for stone bottles as for glass, that by giving occasion to the *same increase* of duty for both, relieves the original presumption (*i. e.*, that *ale-in-bottles* does not include *bottles*) of any difficulty arising from the fact of increase.

The operation of *bottling* seems to be such an act. It is *the same* for stone as for glass, and is of the nature of a manufacture, the result being strictly definable as *ale-in-*

bottles—an article entirely apart from that of the bottles themselves, and therefore suggesting *the same* additional rate of duty, a sameness that does not contradict whatever difference of tariff policy may otherwise mark such *bottles* when of *stone* and when of *glass*.

Upon the whole the grammatical interpretation of the first clause quoted above from Schedule D, which is sought to be varied by a consideration of that part of its context which appears in the second clause is completely vindicated by a consideration of the entire context, and by "the reason of the thing."

The declaration in Park's case refers to two importations (folio 9); and the judgment includes both (folio 18); but the bill of exceptions mentions only the importation by the "Ellen Austin" (folio 23). This is probably an inadvertence. Supposing it to be such, the importation may be applied as follows in illustrating the bearing of the above suggestion as to the presumption that the express distinction for tariff purposes betwixt stone- and glass-bottles when considered *per se*, attends them under other circumstances where *implication* must be resorted to in order to determine the rate of a duty in which they are both involved.

Supposing from the identity as to the amount of duty exacted in each case (folio 9), that the two cargoes of beer were also the same in amount, the whole amount imported was *twice* that mentioned in folio 23, or 2,048 gallons.

At 35 cents per gallon the duty upon the *beer* was therefore $716.80.

By the theory of the importers this should have been the whole amount collected—whether the article was the above amount of beer *in-glass-bottles*, or had been an equal amount of, say, ale *in-stone-bottles*.

But $307.20 of this duty (15 cents per gallon) is owing to the circumstance that the beer was in bottles. If this last item be attributed to the article *bottles*, then there is necessarily a discrepancy betwixt the policy as to glass-bottles and stone-bottles when holding beer or ale, and in other paragraphs where that policy appears in *express provisions*. For by these express provisions (above) if 15 *cents* were added because of *glass* bottles, only 12½ *cents* should be where the bottles are *stone*, or here $256 instead of $307.20.

The theory of the importers then gives no explanation of the circumstance that in passing from *beer* to *beer-in-bottles* the statute has ignored tariff distinctions betwixt *various sorts* of bottles; and of the presumption that therefore the the legislature must be supposed not to refer at this point to such distinctions, and therefore equally not to refer to the articles so distinguished—*i. e.*, not to the *bottles*.

These were therefore left as before, and the collector in enforcing the express distinctions previously imposed upon them pursued the obvious policy of the tariff taken as a whole.

This suggestion falls in with the conclusion drawn from the history of the legislation upon this topic, which is

stated with so much precision and effect by the Court in its Opinion at this term in Schmidt vs. Collector.

That Opinion forms the main reliance for the present contention by the Government.

S. F. PHILLIPS,
Solicitor-General.

P. F. McBREEN, Steam Law and Job Printer, 16 Beekman St., N.Y.

OFFICE SUPREME COURT U.S.
FILED
MAR 3 1883
JAMES H. McKENNEY, CLERK.

U. S. Supreme Court.

EDWIN A. MERRITT,
Plaintiff in Error,

vs.

ALPHONSE STEPHANI *et al.*

October Term,
1882.
No. 525.

Brief of Defendant in Error.

STATEMENT.

Stephani imported, in 1879, "Mineral Waters, (not artificial)" and Merritt as Collector of Customs exacted duty on the bottles under the tariff provision for "glass bottles or jars filled with articles not "otherwise provided for, thirty per centum ad "valorem."

Stephani protested that the importation was free "under Section 2505, Revised Statutes, viz.: "The "importation of the following articles shall be ex- "empt from duty * * mineral waters, all not "artificial."

It was proved, among other things, "that min- "eral waters are and always have been generally "imported into this country in glass bottles, al- "though sometimes contained in stone bottles or "jugs, but the glass bottle is the usual form and "kind of package for natural mineral waters."

Record, page 7, folio 18.

It is within the knowledge of all that, from the time mineral waters are bottled to the time when they are consumed, bottles and water form one commercial article; that they are bought and sold together, and are not separated; also that an article like water cannot be imported or exist as an article of commerce, unless confined in bottles or tight packages.

At the trial, a verdict was directed for the plaintiffs, and the United States brings this case here by writ of error.

Record, pages 7 and 8.

STATUTES TO BE CONSIDERED.

Act March 2, 1861, *Sec.* 17, 12 *Stats.*, 187,

Imposes on "all glass bottles or jars filled with sweetmeats, preserves, or other articles, thirty per centum, ad valorem."

Ibid., *Sec.* 22, 12 *Stats.*, 192,

Imposes on "mineral waters," 30 per centum.

Act July 14, 1862, *Sec* 12, 12 *Stats.* 555,

Imposes 35 per centum in lieu of former duties on "glass bottles or jars filled with sweetmeats, pre-"serves" (*sic.*).

Act June 30, 1864, *Sec.* 9, 13 *Stats.*, 211,

Imposes, in lieu of former duties 40 per centum on "glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for."

Ibid., *Sec.* 13, 13 *Stats.*, 214,

Imposes in lieu of former duties, on "mineral or "medicinal waters, or waters from springs impreg- "nated with minerals, for each bottle or jug con- "taining not more than one quart, three cents, and "in addition thereto, twenty-five per centum ad " valorem; containing more than one quart, three " cents for each additional quart or fractional part " thereof, and in addition thereto, twenty-five per " centum, ad valorem."

Ibid., *Sec.* 22, 13 *Stats.*, 216,

Repeals "all acts and parts of acts repugnant" to its provisions, and provides that duties not provided for remain as they were.

Act June 6, 1872, *Sec.* 5, 17 *Stats.*, 236,

Exempts from duty after August 1, 1872, the "importation of mineral waters, all not artificial."

REVISED STATUTES.

Section 2503.—There shall be levied, collected and paid upon all articles mentioned in the schedules contained in the next section imported from foreign countries the rates of duty which are by the schedules respectively prescribed. * * *

§ 2504, Schedule B.—EARTHS AND EARTHENWARES.

Glass bottles or jars filled with articles not otherwise provided for, thirty per centum ad valorem. * * * Glass bottles or jars filled with sweatmeats or preserves, not otherwise provided for, forty per centum ad valorem. * * * * *

Schedule M.—SUNDRIES.

Mineral or medicinal waters, artificial, for each bottle or jug, containing not more one quart, three cents, and, in addition thereto, twenty-five per centum ad valorem; containing more than one quart, three cents for each additional quart, or fractional part thereof, and, in addition thereto, twenty-five per centum ad valorem.

Section 2505.—The importation of the following articles shall be exempt from duty: Mineral waters, all not artificial.

I.

These statutes show that if the bottle clause of the Act of 1861 embraced mineral water bottles, the Act of 1864 repealed it as to them by imposing the duty of three cents per bottle in *lieu* of former duties,

Gossler *vs.* Collector, 3 Clifford, 71.
Washington Mills *vs.* Russell, 1 Holmes, 245.

And directly repealed *pro tanto* by Section 22, same Act (13 Stats., 216), which repeals all acts and parts of acts repugnant to the provisions of that Act.

For eight years thereafter all mineral waters (artificial and not artificial) paid three cents for each bottle, the same rate that liquors did and do to-day, under Schedule D, and the Act of 1861 had no application to them whatever.

Next, by the Act of June 6, 1872, Sec. 5, above cited, the "importation" of "mineral waters, all not artificial," was exempted from duty.

This Act repealed all inconsistent provisions (Sec. 46, 17 Stats., 258), and peculiar force has been given to its free list, by which even a prior discriminating duty on an article named therein was held to be repealed.

Gautier *vs.* Arthur, 14 Otto, 345, 346.

The clause, then, from the Act of 1861, has had no effect over any mineral water bottles since the Act of 1864.

And when the Act of 1872 transferred "mineral waters, not artificial," to the free list, the Act of 1861 could not be revived as to bottles containing such waters, for the revival of repealed statutes had been forbidden by a general law passed the year before.

Act of February 25, 1871. Sec. 3.
16 Stats., 431, now Rev. Stat., Sec. 12.
Kohlsaat *vs.* Murphy, 96 U. S., 157, 158.
Butler *vs.* Russell, 11 Int. Rev. Rec., 30, and cases cited therein.

Certainly not, even in the absence of the last named law; for if the Act of 1872 was not apt to repeal the duty fixed on bottles containing natural mineral water, then such duty would have remained, as fixed by the Act of 1864, at three cents each, but the Act of 1872 made them free, and in the Revised Statutes the bottle duty is confined to *artificial mineral waters*, which ends any such contention.

Murdock *vs* The City of Memphis, 20 Wallace, 617.
United States *vs.* Bowen, 100 U. S., 508.
Arthur *vs.* Dodge, 101 U. S., 34.

These laws went into the Revised Statutes unchanged, except that the bottle clause from the Act of 1861 had added to it the words "not otherwise provided for" to express that later statutes had restricted its original unrestrained application.

It is clear, then, on a full review of all the legislation, that the clause brought into the statute from the Act of 1861 does not apply to bottles filled with mineral water, either natural or artificial.

The provisions in the Revised Statutes for "filled bottles" are a reproduction of what remained in force of the Act of 1861, with the words "not otherwise provided for" added to the article clause to conform it to later legislation.

Statutes textually reproduced in the revision have attached to them the meaning they had in the former law; they are simply brought forward and reduced to order as is the case here.

15 Opinions Atty.-Genl., 494, 495 and 33.
Sedgwick on Const. and Stat. Law, 428.
Smith's Commentaries on Statutes and Constitutions, 911.

When Congress substitutes the provisions of one tariff act for another the terms are used in the same sense as in the prior act.

Roosevelt *vs.* Maxwell, 3 Blatch., 391.
Reiche *vs.* Smythe, 13 Wallace, 162.

II

The foregoing point disposes of the case, but would not the same result follow had there been no special legislation on mineral water bottles?

If the importation of natural mineral water be exempt from duty, and bottles have always been the usual package for such waters as articles of commerce, Congress is presumed to have legislated on them with knowledge of it, and the bottles must be free of duty.

Karthaus *vs.* Frick, Taney's Decisions. 94, 95.

If the taxing power exempts an article from duty, the proper envelopes, which are a part of the article, are also exempted, for the intent to include the whole must include every part.

Otherwise executive officers might tax the article to prohibition.

In the absence of special legislation envelopes are subject to the same duty as contents, not as is argued because they are different things from contents, but because they are the same thing.

Rev. Stats., Sec. 2907, Sec. 2908. Barnard *vs.* Morton, 1 Curtis, 404.

Treasury Regulations of 1874, page 203, article 437.

If the importation of natural mineral water be exempt from duty, a duty cannot be laid under an earlier statute or an earlier part of the same Act, on the necessary instrumentalities of importation, be, cause then either no such waters can be imported or if imported they are taxed.

The repugnancy is absolute and the latest expression of the lawmakers will must govern, which is that the importation of the goods shall be free.

Harrigton *vs.* Trustees of Rochester, 10 Wend., 550, 554.

In the matter of John Davies, 3 Benedict, 482, 485–6.
Brown *vs.* County Com'r, 21 Penn., 37.
Powers *vs.* Barney, 5 Blatch., 202.
The King *vs.* Justice of Middlesex, 2 Barn & Adol, 818.
Potter's Dwarris on Statutes, p. 170, and cases cited.

The caption of the free list has usually been, "that "the importation of the following articles shall be "exempt from duty;" meaning that no duty shall be collected on the importation:

Rev. Statutes, sec. 2505.

Act March 2, 1861, Sec. 23, 12 Stats., 193.
Acts May 1, 1872, and June 6, 1872, 17 Stats., 59 and 233.
Act February 8, 1875, Sec. 8, 18 Stats. (Part 3), 308.
Act July 1, 1879, 21 Stats., 48.

The particular intent of Congress, that an article shall be exempt from duty, must govern, unless express words making the envelope dutiable are used, as in the acid clause of the free list, in which it says, "But carboys containing acids shall be sub-"ject to the same duty as if empty."

Rev. Stats., Sec. 2505.

Act of February 8, 1875, Sec. 4, 18 Stats., 308. (Proviso.)

And here Congress having removed from the Act of 1864, under which the bottles were dutiable, natural mineral waters to the free list, without providing for the bottles, the inference is irresistible that it intended such bottles to be free.

Even discriminating duties, which are not in pari materia with revenue provisions nor ordinarily affected by the repeal of purely tariff laws, are always stated to be *in addition* to the regular duties.

Rev. Stats., Secs., 2501, 2502.
Hadden *vs.* Hoyt, 5 Wall., 107.
Sturges *vs.* Collector, 12 Wall., 19.
Russell *vs.* Williams, No. 105, October Term, 1882.

The provisions of the *ordinary dutiable schedules* are not construed to cover the envelopes of free goods.

See caption of Sec. 2503, R. S., which applies only to articles named in Section 2504, and not to articles named in Section 2505 the free list.

To illustrate: tea, coffee and cotton are all free of duty (R. S., Sec. 2505); by Section 2504, Schedule C, all *bags of any kind*, and all bagging for cotton, and by Schedule K, all packing boxes of wood are made liable to duty and yet no duty is collected on such free articles coming in these outside packages under the guise of a duty on bags, bagging or boxes, and simply because the package and contents are one commercial article.

More than nine-tenths of the articles on the free list must come in packages and to put a duty on such packages (unless by special command of Congress) is practically to abolish the free list.

Judgment should be affirmed,

EDWARD HARTLEY,
WALTER H. COLEMAN.
Counsel for Defendant in Error.